93-907

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JAMES ARTHUR SHELLING,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED FOR REVIEW

Whether a Plaintiff's action can be summarily dismissed by a court when that Plaintiff voluntarily dismisses his FELA action (an action pursuant to the Federal Employers' Liability Act), due to improper venue, and then refiles his action within the applicable limitations period, in violation of his Due Process and Equal Protection rights guaranteed him by the Fourteenth Amendment to the United States Constitution?

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To The Court Of Appeals Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

Petitioner, JAMES ARTHUR SHELLING, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Georgia refusing to reverse the Superior Court of Bibb County's Order granting a motion for summary judgment to Respondent Southern Railway Company, when Petitioner's action was summarily dismissed when he voluntarily dismissed his state court action, due to improper venue, and refiled that action within the applicable limitations period allowed under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. Section 51, et seq. and 45 U.S.C. Section 56.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is attached, and appears in the Appendix (p.1) to this Petition. The opinion of the Superior Court of Bibb County is attached, and appears in the Appendix (p.3) to this Petition. The Court of Appeals' denial of the Motion for Reconsideration is attached, and appears in the Appendix (p.15) to this Petition. The opinion of the Supreme Court is attached, and appears in the Appendix (p.16) to this Petition. The Supreme Court's denial of the Motion for Reconsideration is attached, and appears in the Appendix (p.17) to this Petition.

JURISDICTION OF THE COURT

The Supreme Court's opinion in this matter was filed on July 15, 1993. A timely Motion for Reconsideration was filed on July 23, 1993. The Supreme Court's denial of the Motion for Reconsideration was issued on September 10, 1993, and is set forth in the Appendix (p.17) to this Petition. This Court's jurisdiciton is invoked pursuant to Title 28, U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution as set forth in the Appendix (p.18) to this Petition.

STATEMENT OF THE CASE

James Arthur Shelling, the Plaintiff in the main action, filed a Complaint against Defendants Norfolk Southern Corporation ("Norfolk"), WDP Transportation, Inc. ("WDP"), Great American Insurance Company ("American"), and Bennie Joseph Polina ("Polina"), alleging that the combined negligence of the named Defendants caused Plaintiff to sustain severe injuries to his body as a result of a train crossing accident that occurred on June 26, 1987, in Sugar Valley, Georgia. The Complaint was originally filed on June 23, 1989, in the State Court of Fulton County (R-290, 293).

Thereafter, Plaintiff amended his Complaint so as to add Southern Railway Company ("Southern") as a party defendant on August 27, 1990 (R-456, 464, 467). On the same day, Plaintiff dismissed Norfolk as a party defendant (R-456, 464, 467).

On June 11, 1991, Plaintiff voluntarily dismissed Defendants WDP, American, and Polina (R-629-634). Subsequently, on July 5, 1991, Plaintiff voluntarily dismissed Norfolk, but not Southern, because Norfolk was not the proper party defendant (R-648). Three days later, on July 8, 1991, Plaintiff filed suit in the Superior Court of Fulton County, naming Southern as the sole Defendant (R-6).

On November 25, 1991, Judge Frank M. Eldridge, Judge for the Superior Court of Fulton County, determined that *venue* was proper in Bibb County, and ordered that the action be transferred to the Superior Court of Bibb County for trial pursuant to O.C.G.A. (Official Code of Georgia Annotated) Section 46-1-2 (R-151).

On February 3, 1992, Plaintiff filed a motion for an Order to Transfer the State Court of Fulton County file to the Superior Court of Bibb County, in order that the Fulton County file could be used to the same extent in Bibb County as it had been used in Fulton County, in order to avoid duplication of discovery that had already been completed.

On March 24, 1992, Judge Walker P. Johnson, Judge for the Superior Court of Bibb County, ordered the Clerk of the State Court of Fulton County to immediately forward the Fulton County record, Civil Action File No. 275289, to the Superior Court of Bibb County. On April 3, 1992, Judge Melvin K. Westmoreland, Judge for the State Court of Fulton County, also ordered that Civil Action File No. 275289 be transferred to the Superior Court of Bibb County (R-165, 177).

On April 13, 1992, Defendant Southern filed a Motion for Summary Judgment, contending that Plaintiff's filing in the Superior Court of Fulton County on July 8, 1991, following his *voluntary dismissal* in the State Court of Fulton County on July 5, 1991, was more than three years after the cause of action arose (referring to 45 U.S.C.A. Sections 51 to 60 (1986) of the Federal Employers' Liability Act ("FELA")), therefore, the statute of limitations had expired on Plaintiff's claim (R-263). Plaintiff opposed said Motion, briefs were submitted and arguments presented before the Superior Court of Bibb County on July 16, 1992; Judge Walker P. Johnson, Jr., presiding.

On July 27, 1992, Judge Johnson granted Defendant Southern's Motion for Summary Judgment, holding that the statute of limitations had expired on Plaintiff's claim

and that the doctrine of "equitable tolling" did not apply to preserve Plaintiff's cause of action (R-1018-1029).

On March 9, 1993, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of Appellee Southern Railway Company.

On March 19, 1993, Appellant James Arthur Shelling filed his Motion for Reconsideration, clearly setting out that the Court of Appeals overlooked material facts in the record and a decision controlling as authority, and erroneously construed and misapplied a provision of law controlling as authority. Nonetheless, on March 30, 1993, the Court of Appeals denied Appellant's Motion for Reconsideration.

On April 19, 1993, Petitioner James Arthur Shelling applied to the Supreme Court for a Writ of Certiorari, which was denied on July 15, 1993.

On July 23, 1993, Petitioner filed his Motion for Reconsideration. However, on September 10, 1993, the Supreme Court denied Petitioner's Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because neither of the courts below acted in a manner (as referenced by their opinions when considering the factual and legal issues of this case) as to protect those rights guaranteed Petitioner by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The opinions by the courts below

conflict with previous decisions of this Court when considering whether or not one's due process and equal protection rights under the Fourteenth Amendment have been violated.

1. The Courts Below Overlooked Material Facts In The Record Pertaining To The Subject Of Venue, Which Constitutes The Central Issue In This Case.

The courts below, in their review of the record in this case, apparently overlooked key facts in the record pertaining to the subject of venue, which constitutes the central issue in this case. From the time Plaintiff James Arthur Shelling filed his original Complaint in the State Court of Fulton County on June 23, 1989, even until now, the central issue *has always been* "venue." Shortly after Plaintiff refiled his action in the Superior Court of Fulton County on July 8, 1991, Defendant Southern Railway Company (hereinafter "Southern") again (as it had done in the State Court of Fulton County) challenged venue in Fulton County as being improper (R-15). After Defendant Southern filed its Motion to Transfer on or about August 8, 1991, the Superior Court of Fulton County granted Defendant's Motion, holding that venue would be proper in Bibb County, and not in Fulton County (R-151).

Defendant Southern succeeded in confusing the issue to be ultimately decided by the courts below by creating a "statute of limitations" scenario (which was argued for the first time once this case was transferred to the Superior Court of Bibb County) as the central question to be addressed by those courts. However, the alleged running of the statute of limitations on Plaintiff James Arthur

Shelling's claim was never the main issue in neither of those courts. The only issue that has ever had any significance to this proceeding has been that of *venue.*

Defendant Southern argued on appeal that when Plaintiff originally dismissed his action in the State Court of Fulton County, he did so for no reason at all; especially not for any considerations with respect to venue. However, *based upon the fact that venue has always been controverted* by Defendant Southern (even when it filed its first Motion to Transfer in the State Court of Fulton County on or about June 17, 1991), and statute of limitations objections were never raised until this case was transferred from the Superior Court of Fulton County to the Superior Court of Bibb County on or about November 25, 1991, unequivocally shows that Plaintiff *could have had no other reason* for voluntarily dismissing his action in the State Court of Fulton County than for the sole purpose of trying to rectify a venue problem.

It is well settled that once a plaintiff commences an action pursuant to the Federal Employers' Liability Act ("FELA") within the three (3) year statute of limitation period, and the action is later dismissed *due to improper venue,* the FELA limitation period is tolled during the pendency of that action. This exact issue was addressed by this Court in *Burnett v. New York Central Railroad Co.,* 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), and should guide this Court in its consideration of Petitioner's Application for a Writ of Certiorari. Simply put, this Court, in *Burnett,* held that:

> " . . . when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing

> party, *and the state court action is later dismissed because of improper venue,* the FELA limitation is tolled during the pendency of the state action."

380 U.S. 428 (emphasis added).

* * *

> *" . . . [t]his Court has held that when a timely FELA action is brought in a state court without proper venue and service of process issues, the statute of limitations cannot bar the action when it is later transferred to a proper state court after the limitation period has run."*

380 U.S. 431 (emphasis added).

When applying these parts of this Court's holding to the facts of this case, it would appear that the lower courts erred in failing to recognize that a statute of limitation problem never existed due to the fact that the limitation period was tolled during the time in which Plaintiff dismissed the State Court action, *because of improper venue,* and the time in which the action was refiled in the Superior Court of Fulton County.

2. The Lower Courts Failed To Follow, Without Explanation, This Court's Ruling In Burnett.

In its brief opinion (of which the Supreme Court denied to even review), the Court of Appeals failed to even mention this Court's holding in *Burnett,* which case is controlling as authority upon that court, but referred to its own ruling in *Parham v. Norfolk Southern R. Co.,* 206 Ga.App. 772, 426 S.E.2d 597 (1992) as its basis for deciding this case. Presumably, the Court of Appeals also relied to some extent upon its own holding in the case of

Smith v. Seaboard System Railroad, Inc., 179 Ga.App. 822, 348 S.E.2d 97 (1986) as being dispositive of the issue(s) in this case.

In *Smith*, supra, the Court of Appeals upheld the trial court's grant of Appellee's Motion for Summary Judgment on the grounds that the three-year statute of limitation period established for FELA actions barred Appellant's refiled action. In that case, the *Smith* plaintiff's case was automatically dismissed due to the fact that no written order was taken in that case for a period of five (5) consecutive years. After the case was dismissed, the *Smith* plaintiff refiled his action in the same court in an effort to preserve his claim. In analyzing the facts of the *Smith* case, the Court of Appeals determined that *Burnett* should be limited ". . . to those cases in which a timely filed and properly served FELA case is *dismissed due to improper venue* after the expiration of the statute of limitation. Since appellant's initial FELA complaint was *dismissed for a reason other than improper venue*, the FELA statute of limitation was not tolled during the pendency of the earlier action." *Smith*, supra, at 823 (emphasis added).

First, it should be noted that the *Smith* case did not even involve a venue issue, as the instant case does. At no time did the *Smith* plaintiff or *Seaboard* defendant challenge the venue/jurisdiction of the Superior Court of Fulton County. This fact alone would remove the instant case from the Court of Appeals' ruling in *Smith*. Second, the Court of Appeals went beyond this Court's holding in *Barnett* by limiting that holding to those situations where an otherwise timely filed FELA case is *dismissed due to*

improper venue after the expiration of the statute of limitation (assuming that by "dismissed" the Court of Appeals meant "involuntarily dismissed" by a trial court). This Court, by its ruling in *Burnett*, did not limit its holding to cases of "involuntary dismissals," and the Court of Appeals failed to follow this Court's ruling by so extending *Burnett* beyond that which was originally intended by this Court.

In *Parham*, supra, the Court of Appeals affirmed the dismissal of plaintiff *Parham's* FELA action, holding that O.C.G.A. Section 9-2-61(a), Georgia's "renewal" statute, did not apply as to prevent plaintiff *Parham's* suit from being barred by the FELA statute of limitation period. Again, it should be noted that this holding issued by the Court of Appeals did not involve a venue issue, as we have in the instant case. The Court's ruling rested on the fact that Georgia's "renewal" statute did not act as to preserve the *Parham* plaintiff's action from being time barred by the FELA limitation period. This being the case, the *Parham* decision would not be dispositive of the instant case. At no time did the *Parham* plaintiff or *Norfolk* defendant challenge the venue/jurisdiction of the State Court of Fulton County, and venue was never even questioned by either party involved. In Appellant's original brief, he even admitted that Georgia's "renewal or savings" statute did not apply to cases under FELA. (See Brief of Appellant James Arthur Shelling, pp.7-8).

In *Missouri Pacific R. Co. v. Tircuit*, 554 So.2d 878, 883 (Miss. 1989), the Supreme Court of Mississippi held that in FELA cases "the running of the period of limitations is tolled upon the filing of the action in a state court, even though that action may subsequently be dismissed on

grounds of improper venue or forum non conveniens," citing *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 434-36, 85 S.Ct. 1050, 1057-58, 13 L.Ed.2d 941 (1965); *Reed v. Norfolk S. Western R. Co.*, 635 F.Supp. 1166, 1167-69 (N.D.Ill.1986).

In the present case, once Plaintiff filed his original action in the *State Court* of Fulton County, the running of the period of limitations was tolled, even though the action was subsequently dismissed. Therefore, by using the rationale of *Missouri Pacific*, the period of limitations was tolled on June 23, 1989, and did not begin to run again until July 5, 1991. Thereafter, on July 8, 1991, a Complaint was filed in the Superior Court of Fulton County against Defendant Southern. This filing was timely and well within the three-year statute of limitations allowed under FELA.

As mentioned before, if the Court of Appeals assumed by its holding in *Smith* that the phrase "dismissed due to improper venue" (as used in the *Burnett* case) *only* meant "involuntarily dismissed," the Court ventured beyond this Court's holding in *Burnett*. This Court did not distinguish between the terms "involuntarily dismissed" and "voluntarily dismissed" in the *Burnett* case, neither did this Court limit *Burnett* to the facts of that case. This is exactly what the Court of Appeals has done though its opinion in *Smith*, therefore, neither *Smith* nor *Parham* are dispositive of the instant case, but this Court's holding in *Burnett* is controlling as authority upon the lower courts involved in this case.

3. The Lower Courts Failed To Address, Without Explanation, The Doctrine Of "Equitable Tolling," And Whether Or Not It Should Be Applied To The Facts Of This Case.

In the Court of Appeals' consideration of the instant case (of which the Supreme Court denied to even review), it can only be presumed that the Court of Appeals did not consider the applicability of the doctrine of "equitable tolling" to the facts of the case at bar. This is indeed peculiar when this Court addressed that very issue at great lengths in the *Burnett* case. Also, many lower courts have recognized the doctrine of "equitable tolling," and the applicability thereof, in their opinions.

In *Walck v. Discavage*, 741 F.Supp. 88 (E.D.Pa.1990), the court reasoned that equitable tolling is "read into every federal statute of limitation [,]" citing *Homberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). Whether the principles of equitable tolling should be applied to a given set of facts demand inquiry into "the purposes and policies underlying the limitations provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act [,]" citing *Burnett v. New York Central Railroad*, 380 U.S. 424, 427, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965).

In *Hosagai v. Kadota*, 700 P.2d 1327, 1331 (Ariz. 1985), the Supreme Court of Arizona adopted a three prong test for determining whether, in a given case, a statute of limitations equitably should be tolled, the relevant factors of which are:

(1) timely notice to defendant in filing the first claim;

(2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and

(3) reasonable and good faith conduct by the plaintiff in prosecuting the first action and diligence in filing the second action.

Hosagai, 700 P.2d at 1333.

In applying the three prong test of *Hosagai* to the facts of the case sub judice, a clear result can be obtained. There was timely notice to Defendant Norfolk in filing the first claim, because Norfolk alleged that it was not the proper party defendant, and was on notice of the initial filing as early as June 23, 1989. There would be *no prejudice* to Defendant in having to gather evidence, in either Gordon, Fulton or Bibb Counties, to defend against the second claim filed on July 8, 1991. In fact, Defendant even petitioned the Superior Court of Fulton County to transfer the case to Gordon County on forum non conveniens and improper venue grounds. Also, Plaintiff exemplified reasonable and good faith conduct in prosecuting and pursuing the first action and diligence in filing the second action. Plaintiff, at no time, slept on his rights or filed either action in bad faith. Statute of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared . . . " *Burnett*, supra, at 428, citing *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49. We do not have such circumstances here, as was the case in *Smith v. Seaboard*,

supra (a case decided by the Court of Appeals of Georgia).

In *Burnett*, supra, this Court held that *"the FELA limitation period is not totally inflexible, but, under appropriate circumstances, it may be extended beyond three years."* *Burnett* at 427 (emphasis added). See also *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); *Osbourne v. United States*, 164 F.2d 767 (C.A.2d Cir. 1947); *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253 (C.A.4th Cir.); *Frabutt v. New York, C. & St. L. R. Co.*, 84 F.Supp. 460 (D.C.W.D.Pa.). The above-mentioned cases "indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett* at 427.

Plaintiff James Arthur Shelling, at all times, pursued his claim with diligence. This action has been accompanied by vigorous motions from both sides since the day the Complaint was filed on June 23, 1989. Defendant Southern has been on constant notice of Plaintiff's efforts to secure the proper forum in which to pursue his action. Defendant Southern has objected to every choice of venue that Plaintiff has sought to utilize. At no time has Plaintiff slept or slumbered on his rights, neither has Defendant been prejudiced by having to "start afresh" gathering evidence and witnesses it would need in the event of a trial. In *Burnett*, supra, this Court stressed that "If by reason of the uncertainties of proper venue a mistake is made . . . 'the interest of justice' may require that the complaint . . . be transferred in order that the plaintiff not be penalized by . . . 'time-consuming and justice-defeating technicalities'." *Burnett* at 430, citing *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467.

4. Petitioner's Constitutional Rights Were Violated When The Lower Courts Summarily Dismissed Petitioner's Claim In Violation Of His Due Process And Equal Protection Rights.

This Court has, on numerous occasions, stressed the importance of individuals having access to the courts to seek redress for wrongs that have been wrought upon them by persons or entities. The right to be heard is a right guaranteed to all citizens of the United States by way of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

In *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), which many consider the "landmark" case in the area of procedural due process, this Court emphasized the importance of affording persons due process of law. This Court held that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, *the right to some kind of hearing is paramount." Id.* at 2705 (emphasis added). This Court went on further to hold:

> "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undetermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Id.* at 2709.

In the case at bar, Petitioner certainly had a property interest encompassed by the Fourteenth Amendment to

the United States Constitution. Petitioner filed a Complaint for Damages against Respondent Southern Railway Company (and various other Defendants) for injuries sustained in a train crossing accident that occurred in Sugar Valley, Georgia. However, due to the fact that the lower courts summarily dismissed Petitioner's action in direct contravention of this Court's holding in *Burnett*, supra, Petitioner was, in essence, arbitrarily deprived of his property interest without due process and equal protection of the law.

In *Boddie v. Connecticut*, 401 U.S. 371, 92 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971), this Court clearly defined the minimum requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution by holding:

> "Although many controversies have raged about the cryptic and abstract words of the Due Process Clause, . . . there can be no doubt, that at a minimum they require that deprivation of life, liberty or property by adjudication be precedent by notice and opportunity for hearing appropriate to the nature of the case," citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)

Although Petitioner was afforded a hearing in which he had the opportunity to contest the motion for summary judgment filed by Respondent Southern Railway Company in the Superior Court of Bibb County, the fact that the Court of Appeals relied upon its holdings in the *Smith* and *Parham* cases in affirming the Superior Court's grant of Respondent's motion for summary judgment, prevented Petitioner from having the type of hearing

contemplated by the *Boddie* and *Mullane* holdings of this Court. In the case a bar, at a minimum, Petitioner should not have been deprived of his property interest without the Court of Appeals basing its decision in the instant case upon this Court's holding in *Burnett*, because *Burnett* was and is controlling upon that court as authority.

The Court of Appeals, in its consideration of this case, failed to even mention the *Burnett* decision in its opinion; therefore, it can only be presumed that the Court of Appeals failed to apply the applicable law to the facts of the instant case, but chose to follow two of its holdings that were neither controlling nor applicable to Petitioner's case.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals of the State of Georgia in this matter.

This 7th day of December, 1993.

Respectfully submitted,

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SECOND DIVISION
BIRDSONG, P.J.
BEASLEY, ANDREWS, JJ.

MAR. 9, 1993

In the Court of Appeals of Georgia

A92A2384. SHELLING v. SOUTHERN RAILWAY COMPANY.

ANDREWS, Judge.

Shelling appeals the grant of Southern Railway's motion for summary judgment on his claim under the Federal Employers Liability Act, 45 USC § 56, et seq.

Shelling was injured when the train on which he was a brakeman collided with a stalled tractor trailer on June 26, 1987. He was then employed by Southern Railway Company. On June 23, 1989, a complaint was filed in Fulton State Court naming as defendants Norfolk Southern Corp.,[1] the trucking concern, its driver and insurer. By consent order of August 24, 1990, Southern Railway Company was added as a defendant in that action.[2]

Having obtained new counsel in the interim, on July 5, 1991, a voluntary dismissal was filed. It listed in the heading "Norfolk Southern Corp." as the defendant and

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[1] Norfolk Southern Corp. is the holding company which owns the stock of several operating railways, including Southern Railway Company, which, effective January 1, 1991, changed its name to Norfolk Southern Railway Company.

[2] On June 11, 1991, the trucking defendants were voluntarily dismissed from the suit, leaving Southern as the sole defendant.

stated "Plaintiff hereby voluntarily dismisses the above-styled action without prejudice."

On July 8, 1991, Shelling filed his FELA claim in Fulton Superior Court, naming as sole defendant Southern Railway Company. Answering, Southern stated its correct corporate name was "Norfolk Southern Railway Company" and moved for a change of venue which was granted, causing the case to be transferred to Bibb County where the motion for summary judgment based on the three-year FELA statute of limitations was filed.

After a review of the record, we find that the trial court in his order fully and correctly addressed the issues in this case. Accordingly, his order, as supplemented by *Parham v. Norfolk Southern R. Co.*, Ga. App. (Case No. A92A1222, issued Nov. 30, 1992), is hereby adopted as the opinion of this court.

Judgment affirmed. Birdsong, P. J., and Beasley, J., concur.

IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

JAMES ARTHUR SHELLING,	:	CIVIL ACTION
Plaintiff	:	NO. 84874
v.	:	
SOUTHERN RAILWAY COMPANY,	:	
Defendant and Third Party Plaintiff,	:	
v.	:	
WDP TRANSPORTATION, INC. and GREAT AMERICAN INSURANCE CO.,	:	
Third Party Defendants	:	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's Motion for Summary Judgment has come on for hearing before this Court, and briefs have been submitted. The Court has considered the entire record before it and grants Defendant's Motion for Summary Judgment for the reasons stated below.

Findings of Fact

On June 26, 1987, Plaintiff, James Arthur Shelling ("Shelling"), was working as the brakeman on a train in Gordon County, Georgia when the train struck a tractor-trailer that had stalled across the tracks in the path of the train. As a result of the collision, Shelling allegedly sustained injury for which he filed an action pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51 to 60 (1986).

Shelling initially filed his action in the State Court of Fulton County on June 23, 1989. Shelling named as defendants in the original suit Norfolk Southern Corporation ("Norfolk"), WDP Transportation, Inc. ("WDP"), Great American Insurance Company "American"), and Bennie Joseph Polina ("Polina"). Shelling then filed an amended complaint, dismissing Norfolk as a defendant and naming Southern as a defendant. The amended complaint was filed on August 27, 1990; a separate voluntary dismissal of Norfolk was entered at the same time. Thereafter, on June 11, 1991, Shelling voluntarily dismissed defendants WDP, American, and Polina. Shelling then filed a dismissal on July 5, 1991, which stated, "Plaintiff hereby voluntarily dismisses the above-styled action without prejudice."

Three days later, on July 8, 1991, Shelling filed suit in the Superior Court of Fulton County, naming Southern as the sole defendant. Southern responded to the Fulton Superior Court claim by asserting that it was incorrectly named as the defendant and should have been named as Norfolk Southern Railway Company.[1] Southern also

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[1] In its Supplemental Brief in Support of its Motion for Summary Judgment, Southern has attempted to explain the confusion over whether Southern or Norfolk is the proper party, stating:

> Norfolk Southern Corporation is not a common carrier by railroad. It is a holding company which owns several companies which are common carriers including Southern Railway Company. The correct railroad defendant in this action is Southern Railway Company, not its parent, Norfolk Southern Corporation. Effective January 1, 1991, Southern Railway Company changed its name to Norfolk Southern Railway Company.

(Supplemental Brief of Defendant Southern Railway Company in Support of Its Motion for Summary Judgment at 2, n.1.)

challenged the venue, claiming that the suit should be transferred to the Superior Court of Gordon County. In addition, Southern filed a third-party complaint, naming WDP and American as defendants.

After entertaining motions and briefs on Southern's request for change of venue, the Superior Court of Fulton County denied Southern's Motion to Transfer to Gordon County, but rather ordered that the case be transferred to the Superior Court of Bibb County. After the transfer to Bibb County, Southern filed its Motion for Summary Judgment, contending that Shelling's filing in the Superior Court of Fulton County on July 8, 1991, following his voluntary dismissal in the State Court of Fulton County, was more than three years after the cause of action arose and, therefore, the statute of limitations had expired on Shelling's claim. Shelling opposed the motion, briefs were submitted and arguments presented to the Bibb Superior Court.

Conclusions of Law

Shelling's initial argument is that the statute of limitations has not run on his claim because Southern has never been dismissed from the original action filed in Fulton County State Court. Shelling maintains that his suit against Southern was transferred from Fulton County State Court to Fulton County Superior Court and from there to the present Court. However, the pleadings filed in Fulton County State Court belie such a claim.

Shelling does not contend that WDP, American, or Polina remain as parties in the State Court, nor could he as each was clearly voluntarily dismissed in State Court.

It is also clear that Norfolk was dismissed when Southern was added as a defendant in the State Court claim. Nevertheless, Shelling asserts that the voluntary dismissal of July 5, 1991 had the effect of dismissing Norfolk Southern Railway, but not Southern Railway. This contention is without merit, however, because the voluntary dismissal of July 5 unambiguously states, "Plaintiff hereby voluntarily dismisses the *above-styled action* without prejudice." (Emphasis added.) Such language does not lend itself to the interpretation which Shelling wishes to place upon it.

A plaintiff's right to dismiss an action is controlled by O.C.G.A. § 9-11-41, which states in relevant part: "Subject to the provisions of subsection (c) of Code Section 9-11-23, of Code Section 9-11-66, and of any statute, an action may be dismissed by the plaintiff, without order or permission of court, by filing a written notice of dismissal at any time before the plaintiff rests his case. . . . " O.C.G.A. § 9-11-41(a) (Supp. 1992). "Such a voluntary dismissal terminates the action." *Mitchell v. Wyatt,* 192 Ga. App. 127, 129 (1989).

On July 5, Southern was the only party remaining in the State Court action. Even though Southern was not named specifically in the dismissal, and even though Southern was not named as a party in the caption, the dismissal, because it had the effect of dismissing the entire action, had the effect of dismissing Southern. Therefore, Shelling's claim that Southern has never been dismissed from the State Court action is erroneous.

Having concluded that Shelling dismissed his action in the State Court, this Court must next decide whether

having done so, Shelling allowed the statute of limitations to expire on his claim. Suits brought under FELA are governed by 45 U.S.C.A. § 56, which provides: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C.A. § 56 (1986). Shelling concedes that if the statute of limitations on his claim was not tolled, it would have run out on June 25, 1990. (Objection to Motion for Summary Judgment at 4.) He contends, however, that during the pendency of his action in State Court the statute of limitations on his FELA claim was tolled. This Court disagrees.

As a general rule, the filing of a claim based on a tortious act does not serve to stop the running of the statute of limitations on that claim. Thus, the clock continues to run and the statute may expire while the suit is pending. *See Rakestraw v. Berenson*, 153 Ga. App. 513 (1980). Absent some exception to this general rule, therefore, the statute continued to run on Shelling's claim even after he filed suit in the State Court on June 23, 1989 and the statute of limitations would have expired on June 25, 1990. Shelling maintains that *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), creates such an exception.

In *Burnett*, the Supreme Court held "that when a plaintiff begins a timely FELA action in a state court having jurisdiction, and serves the defendant with process and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit." *Id.* at 434-35. While at first glance the holding appears to support Shelling's contention that the filing of

his FELA action in State Court tolled the statute of limitations, this Court is persuaded that at least one critical fact distinguishes the instant case from *Burnett* and precludes such a conclusion: the plaintiff's dismissal in *Burnett* was involuntary, while Shelling's dismissal was voluntarily taken.

A key consideration expressed by the Court in *Burnett* was Congress' intent to create national uniformity in the operation of FELA. By holding as it did, the Court furthered that intent by avoiding a procedural anomaly:

> A plaintiff who brings a timely FELA action in a federal court where venue is improper would not be barred by the subsequent running of the limitation period, 28 USC § 1406(a), nor would a plaintiff who brings a timely FELA action in a state court where venue is improper be barred by the subsequent running of the limitation period provided that the State has a "transfer" statute and venue is proper elsewhere in the State. However, a similar plaintiff in a state court would be barred from further actions by the running of the limitation period if the State relies upon a "saving" statute, rather than a "transfer" statute to preserve similar state actions. Thus, in effect, a nonuniform limitation provision would be produced.

Burnett, 380 U.S. at 433-34 (citation omitted) (footnote omitted).

Rather than supporting Shelling's position that the statute of limitations was tolled by the filing of his State Court claim, the analysis provided by the Court in *Burnett* suggests the contrary. Congress' intent to create uniformity would be thwarted if plaintiffs were permitted to

toll the statute of limitations on FELA claims each time they filed a claim in state court. Shelling's analysis of *Burnett* would permit a FELA claimant to initiate his claim in a state court, pursue it indefinitely, then voluntarily dismiss it only to restart the statute of limitations where he left off at the time of the initial filing. This Court refuses to construe *Burnett* so broadly.

The decision to limit *Burnett* to cases in which the plaintiff's claims are involuntarily dismissed is supported by the decision in *Smith v. Seaboard System Railroad,* 179 Ga. App. 822 (1986). In *Smith,* plaintiff's claim was automatically dismissed because a period of five years lapsed in which no written order was taken. The Georgia Court of Appeals refused to extend the holding in *Burnett* to include automatic dismissals, stating:

> The above analysis convinces us to limit the *Burnett* holding to those cases in which a timely filed and properly served FELA case is dismissed due to improper venue after the expiration of the statute of limitation. Since appellant's initial FELA complaint was dismissed for a reason other than improper venue, the FELA statute of limitation was not tolled during the pendency of the earlier action.

Id. at 823. The court of appeal's decision to refrain from extending *Burnett* to include involuntary dismissals other than those for improper venue suggests that a restrained reading of *Burnett* is in order and it would be inappropriate, therefore, to extend it even further, so as to include voluntary dismissals.

Moreover, *Burnett* was primarily concerned with placing plaintiffs in those states without transfer statutes

on the same footing as plaintiffs in states with transfer statutes. The injustice which *Burnett* sought to avoid is not present in the instant case because Georgia has a transfer mechanism in place. Pursuant to the Uniform Transfer Rules, "when the court in which the case is pending is alleged to lack jurisdiction or venue or both" the case may be transferred to a court having proper jurisdiction or venue. Unif. Transfer R. T-2. In the event of a transfer, "[t]he case shall continue in the court to which transferred as though initially commenced there." Unif. Transfer R. T-13. The Uniform Transfer Rules, therefore, protect a plaintiff who has filed a timely suit in an improper forum, just as *Burnett* was intended to do.

The conclusion that the holding in *Burnett* does not encompass the situation at issue here, and, therefore, that the statute of limitations was not tolled during the pendency of Shelling's claim in State Court raises the question of whether Shelling's refiling in Superior Court is governed by Georgia's renewal statute. Georgia law recognizes the right of a plaintiff to refile a claim that has been dismissed, even though the statute of limitations on the claim has already expired. O.C.G.A. § 9-2-61 (Supp. 1992). Under this renewal provision, a plaintiff has six months after the dismissal to recommence the action. *Id.*

The language of *Burnett* makes clear, however, that O.C.G.A. § 9-2-61 is not available to Shelling. After determining that "Congress did not intend the statute of limitations to bar a plaintiff who brings a timely FELA action in a state court of competent jurisdiction, who serves the defendant with process, and whose action is later dismissed for improper venue," *Burnett*, 380 U.S. at 432, the Court stated, "This does not mean that we can accept

petitioner's argument that the federal limitation provision incorporates the [state saving statute]. To allow the limitation provision to incorporate state saving statutes would produce nonuniform periods of limitation in the several states." *Id.* at 432-33. Persuaded by Congress' intent to create a uniform operation, the Court refused to incorporate state savings statutes into FELA claims. This Court holds, therefore, that the O.C.G.A. § 9-2-61 is not available to Shelling on his FELA claim.

Finally, Shelling has asked this Court to apply the doctrine of equitable tolling in order to allow him to maintain his claim. This Court notes initially that the doctrine of equitable tolling arises more frequently in those cases where the plaintiff has alleged fraud or some other affirmative act on the part of the defendant, or some extraordinary event has occurred which has served to prevent the plaintiff from pursuing his claim in a timely fashion. *See, e.g., Lowe v. Pue,* 150 Ga. App. 234 (1979) (statute of limitations tolled due to mental incompetency of plaintiff); *Retail Credit Co. v. Russell,* 234 Ga. 765 (1975) (fraud of defendant operated to toll statute of limitations).

Moreover, the Georgia legislature has identified specific situations in which the statute of limitations for a given cause of action will be held not to apply. *See* O.C.G.A. §§ 9-3-90 to 9-3-98 (1982 & Supp. 1992). Nothing in the record suggests that any of the state statutory exceptions apply, nor has Shelling presented his case as one in which some circumstance beyond his control prevented timely filing.

Shelling's primary argument in support of the application of equitable tolling is that Southern will not be prejudiced if Shelling is allowed to refile his claim because Southern has had sufficient notice of the claim. In support of this position, Shelling relies on language from *Burnett*, in which the Court stated that "the FELA limitation period is not totally inflexible" and "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett*, 380 U.S. at 427.

Although *Burnett* clearly recognizes that the facts in some cases will give rise to situations in which equitable tolling will extend the three-year limitation period under FELA, the situation sub judice is not such a case. Shelling's error in dismissing his State Court claim, while unfortunate, does not present the type of extraordinary situation for which equitable tolling is preserved. The Georgia Supreme Court, in *Bank of Jonesboro v. Carnes*, 187 Ga. 795 (1939), stressed that the statute of limitations should only be extended where there has been a showing of "invincible necessity." *Id.* at 799. In reaching this result, the court noted:

> Statutes of limitation have in many discussions been described as statutes of "repose." They are intended not alone for the benefit of the party in whose favor they have run, but are also for the general public good. They fix a time within which controversies must be set at rest, and prevent injustices where parties and witnesses have died, and other evidence lost in the passing of time and events. Adherence to them sometimes brings harsh and what may seem to be inequitable results.

Id. Thus Georgia case law suggests that only in extraordinary circumstances should a statute of limitations be extended, even when the result will be harsh. Nor does federal case law support Shelling's position.

As the Second Circuit Court of Appeals has noted, "Equitable tolling occurs under federal law in two types of situations: (1) where defendant's wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim." *Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1549 (N.D. Cal. 1987). *See also Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959) (defendant misled plaintiff into believing that he had more than three years in which to bring his action); *Osbourne v. United States,* 164 F.2d 767 (2d Cir. 1947) (onset of war prevented plaintiff from bringing his suit).

In *Osbourne,* the Second Circuit Court of Appeals stated what it deemed to be the "general rule" with respect to the limitations period under FELA, holding that FELA

> will control the time for bringing suit in a state court regardless of state statutes of limitations; that the period of limitations . . . will not be extended, as it would be in the case of an ordinary statute of limitations by a claimant's disability to sue because of infancy or insanity or by a delay occasioned by the fraud of the defendant; and that the defendant cannot waive the defense of the period of limitations.

Id. at 768. Although the decision in *Burnett* has modified the "general rule" somewhat, it has not altered the rule to the extent Shelling claims.

Shelling has cited numerous cases from other jurisdictions that he contends support the application of equitable tolling in the instant case, but this Court finds none of them to be persuasive. None of the cases offered by Shelling stands for the proposition that a plaintiff who voluntarily dismisses a pending action, thereby allowing his claim to lapse, has been thrust into the type of fact situation which equitable tolling is intended to address. All of the foregoing persuades this Court that the Statute of Limitations on Shelling's claim has expired and Southern's Motion for Summary Judgment should be granted.

SO ORDERED this 27th day of July, 1992.

/s/ Walker P. Johnson
WALKER P. JOHNSON, JR.
Judge, Superior Courts
Macon Judicial Circuit

Court of Appeals

of the State of Georgia

ATLANTA, MARCH 30, 1993

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A92A2384

JAMES ARTHUR SHELLING, JR. V. SOUTHERN RAILWAY COMPANY

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

[SEAL] *Court of Appeals of the State of Georgia*

Clerk's Office, Atlanta MAR 30 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ Victoria McLaughlin

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: JULY 15, 1993

Melvyn J. Williams
142 Mitchell Street
Suite 401
Atlanta Ga 30303

Case No. S93C1113

JAMES ARTHUR SHELLING V. SOUTHERN RAILWAY COMPANY

COURT OF APPEALS CASE NO. A92A2384

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Sears-Collins, J., not participating.

Sincerely,

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

ATLANTA SEPTEMBER 10, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93C1113

JAMES ARTHUR SHELLING V. SOUTHERN RAILWAY COMPANY

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FILED
JAN 10 1993
OFFICE OF THE CLERK

(2)

No. 93-907

In The

Supreme Court of the United States

October Term, 1993

JAMES ARTHUR SHELLING,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should summary judgment be granted against a plaintiff who without explanation voluntarily dismisses his FELA action after the statute of limitations has expired and subsequently attempts to renew his claim by filing a second action?

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STATEMENT OF THE CASE

This case involves the application of well established principles of law concerning the Federal Employers Liability Act (FELA) statute of limitations, 45 U.S.C. § 56. This Court's decision in *Burnett v. New York Central Railroad Company*, 380 U.S. 424, 85 S.Ct. 1050, 13 L. Ed. 2d 941 (1965) is the cornerstone of those principles. The trial court in its lengthy order and the Court of Appeals of Georgia correctly applied *Burnett* to the facts of this case in holding that (1) the Georgia "renewal" statute does not apply so as to extend the FELA statute of limitations, and (2) Shelling is not entitled to tolling where he voluntarily dismissed his action for no stated reason after the statute had expired.

Respondent Southern Railway Company strongly disagrees with Petitioner's contention that the dismissal of his first action was precipitated by a venue problem. In fact, Shelling never claimed that venue prompted his dismissal until he filed a motion asking the Court of Appeals of Georgia to reconsider its decision. The Petitioner's Statement of the Case also contains numerous extraneous facts which are irrelevant to the question at hand. For purposes of continuity, Respondent will outline the facts from the proceedings in the trial court which are pertinent to the limitations issues.

Shelling was employed as a brakeman by Southern Railway Company. On June 26, 1987, Shelling was on a train which struck a tractor-trailer that had stalled on a crossing. On June 23, 1989, he filed his initial suit in the State Court of Fulton County naming as defendants Norfolk Southern Corporation and various trucking-related parties. By consent order, the complaint was amended to drop Norfolk Southern Corporation and add Southern Railway Company as the railroad defendant.

On June 11, 1991, Shelling voluntarily dismissed the trucking defendants, leaving Southern as the sole defendant in the State

Court of Fulton County. On July 5, 1991, Shelling, without explanation, terminated his original action by filing a voluntary dismissal which stated "Plaintiff hereby voluntarily dismisses the above-styled action without prejudice." The voluntary dismissal came more than four years after Shelling's cause of action had accrued on June 26, 1987. On July 8, 1991, three days after the voluntary dismissal, Shelling refiled his action in a court of the same county, *i.e.*, the Superior Court of Fulton County. The sole named defendant in the second action was Southern Railway Company.

The transparency of the Petitioner's venue argument can easily be seen. Shelling did not dismiss his original suit in the State Court of Fulton County for improper venue. If improper venue had prompted the dismissal, he would not have refiled three days later in the exact same county. Rather than dismissing for improper venue, Shelling was engaging in forum shopping within Fulton County (Atlanta) in the mistaken belief that the Georgia renewal statute, O.C.G.A. § 9-2-61, applied to FELA actions. Only after learning that the renewal statute did not apply did Shelling construct his argument that venue led to the dismissal.

In the trial court, Southern moved for summary judgment contending that Shelling's refiling in the Superior Court of Fulton County more than four years after the accident was barred by the statute of limitations. After briefing and oral arguments, the trial court agreed issuing a lengthy order which, among others, found that tolling under *Burnett v. New York Central* did not apply to the facts presented. (App. 3-14).

Petitioner appealed to the Court of Appeals of Georgia which affirmed the trial court in an unpublished opinion. The Court of Appeals expressly adopted the order of the trial court as its opinion stating that "we find the trial court in his order fully and correctly addressed the issues in this case." (App. 1-2). The Supreme Court

of Georgia declined to review the decision on certiorari. (App. 16-17).

REASONS FOR DENYING THE WRIT

I.

UNDER *BURNETT V. NEW YORK CENTRAL*, STATE RENEWAL STATUTES DO NOT EXTEND THE FELA STATUTE OF LIMITATIONS.

An analysis of the bar of the statute of limitations in this case begins with the effect of the Georgia renewal statute, O.C.G.A. § 9-2-61(a). This statute allows a plaintiff who has voluntarily dismissed his action to refile within six months. In pertinent part, it provides:

> If a plaintiff discontinues or dismisses his case and recommences the same within six months, the renewal case shall stand upon the same footing, as to limitation, with the original case.

O.C.G.A. § 9-2-61.

In *Burnett v. New York Central Railroad Company, supra,* this Court refused to incorporate state saving and renewal statutes into the FELA. Reasoning that a variety of state statutes would defeat the aim of national uniformity in the application of the FELA statute of limitations, the Court said:

> This does not mean that we can accept petitioner's argument that the federal limitation provision incorporates the Ohio Saving Statute. To allow the limitation provision to incorporate state saving statutes

> would produce non-uniform periods of limitation in the several States. The scope of such statutes and the length of additional time they allow vary considerably from State to State. Moreover, not all States have saving statutes . . . . The incorporation of variant state saving statutes would defeat the aim of a federal limitation provision designed to produce national uniformity.

380 U.S. at 432-433.

In *Smith v. Seaboard System Railroad, Inc.*, 179 Ga. App. 822, 348 S.E. 2d 97 (1986), the Court of Appeals of Georgia followed *Burnett* and refused to incorporate O.C.G.A. § 9-2-61 so as to save the plaintiff's FELA suit which was refiled less than two months after an involuntary dismissal of his prior action. The court said:

> The court [in *Burnett*], however, refused to incorporate the saving statutes into the FELA statute of limitation because the variety of saving statutes "would produce nonuniform periods of limitation in the several States." *Id.* at 433.

179 Ga. App. at 823.

In *Parham v. Norfolk Southern Railway Company*, 206 Ga. App. 772, 426 S.E. 2d 597 (1992), the Court of Appeals of Georgia again relied upon *Burnett v. New York Central.* There the plaintiff voluntarily dismissed his FELA action more than three years after the date of his injury. He refiled his suit approximately five months later and contended that the Georgia renewal statute applied. The court in *Parham* disagreed and reaffirmed its prior decision in *Smith v. Seaboard* which it noted was based upon the controlling authority of *Burnett v. New York Central.*

Respondent has found no contrary authority holding that state renewal statutes apply to FELA lawsuits. Decisions from the following jurisdictions are in accord: *Price v. Illinois Central Gulf R. Co.*, 584 So. 2d 1279, 1281 (Miss. 1991); *Stine v. Kansas City Term R. Co.*, 564 S.W. 2d 619, 621 (Mo. Ct. App. 1978). *See Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988); *Gray v. Hallett*, 525 N.E. 2d 89 (Ill. App. 1988) (Although not expressly a holding of each case, both opinions state that *Burnett* declares state saving statutes inapplicable to FELA litigation.) *See also Stephen v. Selvic Marine Towing Co.*, 559 N.E. 2d 147, 150 (Ill. App. 1990) and *Izquierdo v. Cities Service Oil Co.*, 244 F. Supp. 758, 760 (S.D. N.Y. 1965) (holding that state renewal statutes cannot be used in litigation under the Jones Act, 45 U.S.C. § 688, which incorporates the FELA).

Having voluntarily dismissed his suit more than four years after his injury, Shelling cannot claim the benefit of the Georgia renewal statute to surmount a limitations defense. The remainder of this Brief will dismiss the inapplicability of the remaining exceptions to the running of the statute, *i.e.*, tolling for improper venue under *Burnett* and equitable tolling.

II.

THE STATUTE OF LIMITATIONS WAS NOT TOLLED DURING SHELLING'S PRIOR ACTION UNDER THE RULE OF *BURNETT V. NEW YORK CENTRAL.*

Contrary to Petitioner's assertions, the lower courts did not overlook or misapply *Burnett v. New York Central.* The trial court's order analyzed *Burnett* in depth before distinguishing it from the present case. (App. 7-10). As noted previously, the Court of Appeals of Georgia expressly adopted the order of the trial court in its opinion. (App. 2).

Rather than the lower courts, it is clearly Shelling who is misapplying the holding of *Burnett*. In *Burnett*, the plaintiff filed suit under FELA in Ohio for an accident which occurred in Indiana. Subsequent to the running of the three-year limitations period, the Ohio state court found venue to be improper and dismissed the case. The plaintiff refiled in the proper federal court only eight days later; however, the federal court dismissed the action on the ground that the limitations period had run.

On appeal in *Burnett*, this Court first recognized that had the plaintiff's complaint been filed in a federal court where venue was improper, he could have utilized 28 U.S.C. § 1406(a) to simply transfer the action to the proper federal court. Similarly, the Court noted that at that time, 31 states had adopted "transfer" statutes analogous to 28 U.S.C. § 1406(a) which would provide for transfer to a state court of proper venue. 380 U.S. 431, n. 8.

The problem in *Burnett*, however, was that Ohio was one of 19 states which had not adopted a "transfer" statute, and therefore the state court had no choice except to dismiss the original complaint altogether. Had Ohio enacted such a "transfer" statute, then the plaintiff's complaint would have simply been transferred to the court in which venue was proper.

To avoid this procedural anomaly and to create national uniformity in the operation of the FELA in all states, the Supreme Court in *Burnett* held that the FELA statute of limitations would be tolled in the following limited situation:

> . . . when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, ***and the state court action is later dismissed because of improper venue,*** the FELA limitations is tolled during the pendency of the state action.

380 U.S. at 428 (emphasis supplied).

In *Smith v. Seaboard System Railroad, Inc., supra,* the Court of Appeals of Georgia had occasion to apply the rule of *Burnett v. New York Central.* In *Smith,* the plaintiff filed an FELA action on account of a 1979 injury. In 1985, the case was automatically dismissed under Georgia law following a period of five years in which no written order was taken. Less than two months later, the plaintiff refiled his action at a point in time five and one-half years after the date of the accident. The trial court granted Seaboard's motion for summary judgment on the ground that the three-year FELA statute of limitations had expired.

On appeal, the Georgia Court of Appeals in *Smith v. Seaboard* noted that in *Burnett* "the court ruled that the pendency of a timely filed, properly served FELA action, *dismissed because of improper venue,* would toll the FELA statute of limitation." 179 Ga. App. 823 (emphasis supplied). The court refused to extend the holding in *Burnett* to include an automatic dismissal, stating:

> The above analysis convinces us to limit the *Burnett* holding to those cases in which a timely filed and properly served FELA case is dismissed due to improper venue after the expiration of the statute of limitation. Since appellant's initial FELA complaint was dismissed for a reason other than improper venue, the FELA statute of limitations was not tolled during the pendency of the earlier action.

179 Ga. App. at 823.

The trial court in the present case correctly reasoned that *Smith v. Seaboard* suggests that a restrained reading of *Burnett* is in order. If *Smith v. Seaboard* refused to extend *Burnett* so as to cover

involuntary automatic dismissals, it would be inappropriate to extend it even further so as to include Shelling's voluntary dismissal. (App. 9). This is particularly so where Shelling did not dismiss his prior action on account of venue.

The reasoning of *Burnett v. New York Central* leads to the logical conclusion that only involuntary dismissals invoke tolling. The class of plaintiffs that *Burnett* was concerned about were those who faced involuntary dismissals for lack of venue without the saving grace of a transfer mechanism. *Burnett,* thus, had nothing to do with remedying a plaintiff's predicament caused by a voluntary dismissal.

Other courts have similarly construed *Burnett v. New York Central* to apply only to involuntary dismissals. *See McKinney v. CSX Transportation, Inc.*, 298 S. C. 47, 378 S.E. 2d 69 (1989) (no tolling allowed under *Burnett* where plaintiff voluntarily dismissed his first action after the statute had expired); and *Stine v. Kansas City Terminal R.W. Co.*, 564 S.W. 2d 619, 622 (Mo. Ct. App. 1978) (a voluntary nonsuit "alone would appear to remove the instant case from the working realm of the ultimate holding in *Burnett.*").

Thus, *Burnett v. New York Central* has no application in this case because Shelling's complaint in the State Court of Fulton County was not involuntarily dismissed for improper venue. *Burnett* has been narrowly confined to the fact situation it was intended to remedy. Petitioner has cited no case in which *Burnett* has been extended beyond those facts.

Even if *Burnett* might be read broadly enough to cover voluntary dismissals, it would not benefit Shelling because he did not purport to dismiss his prior action due to a lack of venue. The Petitioner's contention that venue prompted the dismissal is at best disingenuous and is affirmatively belied by the record. Shelling's

original action was dismissed on July 5, 1991 by the filing of a voluntary dismissal which simply said "Plaintiff hereby voluntarily dismisses the above-styled action without prejudice." The dismissal said nothing whatsoever about venue. Moreover, a venue problem could not have precipitated Shelling's dismissal because three days later on July 8, 1991, he refiled his action in the very same county.

Surely, Petitioner and his counsel did not believe that dismissing and refiling in Fulton County would cure a venue problem. Obviously Shelling was forum shopping in the erroneous belief that the Georgia renewal statute, O.C.G.A. § 9-2-61, would apply. There is no other explanation for his act of refiling the second action in the same county. Thus, even if *Burnett* might apply to a voluntary dismissal for improper venue, it would not apply here to toll the statute.

Moreover, due to recent developments, it is now doubtful that the limited holding of *Burnett* is even applicable in Georgia. The trial court noted that Georgia has adopted a transfer mechanism which eliminates the venue problem which *Burnett* sought to remedy:

> . . . *Burnett* was primarily concerned with placing plaintiffs in those states without transfer statutes on the same footing as plaintiffs in states with transfer statutes. The injustice which *Burnett* sought to avoid is not present in the instant case because Georgia has a transfer mechanism in place. Pursuant to the Uniform Transfer Rules, "when the court in which the case is pending is alleged to lack jurisdiction or venue or both" the case may be transferred to a court having proper jurisdiction or venue. Unif. Transfer R. T-2. In

> the event of a transfer, "[t]he case shall continue in the court to which transferred as though initially commenced there." Unif. Transfer R. T-13. The Uniform Transfer Rules, therefore, protect a plaintiff who has filed a timely suit in an improper forum, just as *Burnett* was intended to do.

(App. 9-10).

The trial court and the Court of Appeals of Georgia correctly held that under these facts the rule of *Burnett v. New York Central* did not toll the statute of limitations during Shelling's first action.

III.

THE LOWER COURTS CORRECTLY FOUND THAT EQUITABLE TOLLING SHOULD NOT BE APPLIED.

Petitioner further asserts that the doctrine of equitable tolling should be applied to save his action. However, the trial court properly found that Shelling, who voluntarily dismissed his pending action in the State Court of Fulton County, had not "been thrust into the type of fact situation which equitable tolling is intended to address." (App. 11-14).

The trial court first reviewed Georgia case law concerning the relaxation of the statute of limitations in certain extraordinary situations. *See,* for example, *Bank of Jonesboro v. Carnes,* 187 Ga. 795, 2 S.E. 2d 495 (1939) (statute should be extended only upon a showing of "invincible necessity."). (App. 12).

The trial court then turned its attention to federal law and stated the following with respect to the scope of equitable tolling:

> As the Second Circuit Court of Appeals has noted, "Equitable tolling occurs under federal law in two types of situations: (1) where defendant's wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim." *Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1549 (N.D. Cal. 1987). *See also Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959) (defendant misled plaintiff into believing that he had more than three years in which to bring his action); *Osbourne v. United States,* 164 F.2d 767 (2d Cir. 1947) (onset of war prevented plaintiff from bringing his suit).

(App. 13).

Petitioner relies primarily upon a so-called "three prong test" citing the case of *Hosogai v. Kadota,* 147 Ariz. 227, 700 P.2d 1327 (1985), which was not an FELA action. The Petition fails to mention, however, that *Hosogai* refers to a requirement of "extraordinary events" in order for equitable tolling to apply. The court in *Hosogai* enumerated examples where equitable tolling might be applied:

> The equitable tolling doctrine is noted in a number of common law exceptions to statutes of limitations, including: defendant's fraudulent concealment of a cause of action; . . . defendant's inducement of plaintiff not to sue; . . . disability of the suing party; . . . and delays due to war . . .

700 P.2d at 1331.

Shelling's situation is not remotely close to these examples. Shelling's claim was not dismissed due to wrongful conduct of Southern. Nor were there extraordinary forces outside plaintiff's control that caused his voluntary dismissal. As such, equitable tolling does not apply here.

It is not enough that Shelling claims an absence of prejudice or that his actions were prosecuted with diligence. Prejudice *vel non* is not a consideration when a court is faced with whether a lawsuit should be dismissed because of the applicable limitations statute. The statute of limitations is not a mere technicality. It is an absolute bar which is intended not only for the benefit of the Defendant but also for the "general public good." *Bank of Jonesboro v. Carnes*, 187 Ga. 799. Thus, the statute of limitations applies so as to extinguish untimely claims even though the result may sometimes seem harsh and inequitable.

Moreover, if mere diligence and lack of prejudice were sufficient, then virtually every case would at the very least present jury issues with respect to the bar of the statute. This should not be the case. To hold otherwise would, as the trial court observed, thwart the intent of Congress to have a nationally uniform federal limitations provisions if plaintiffs are permitted to toll the statute on FELA claims each time they file a claim in state court. "Shelling's analysis of *Burnett* would permit a FELA claimant to initiate his claim in a state court, pursue it indefinitely, then voluntarily dismiss it only to restart the statute of limitations where he left off at the time of the initial filing."(App. 8-9).

Public policy considerations demand that statutes of limitations not be subject to indefinite extension at the whims of plaintiffs. Only in extraordinary circumstances have courts applied equitable tolling to salvage a claimant's failure to comply with the statute of limitations. Shelling's unilateral act of voluntarily dismissing his complaint without a reason is surely not such a situation.

IV.

THE COURT SHOULD NOT CONSIDER THE CONSTITUTIONAL ISSUES RAISED FOR THE FIRST TIME IN THE PETITION.

At pages 15-17 of the Petition, Shelling argues that the dismissal of his action violated his due process and equal protection rights under the Fourteenth Amendment to the United States Constitution. Respondent respectfully submits that the Court should decline to consider these arguments because Petitioner failed to raise them at any point in the proceedings below. In *Cardinale v. State of Louisiana*, 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 (1969), the Court reaffirmed the long-standing rule that it will not consider constitutional issues first raised in the Petition for Writ of Certiorari:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.

394 U.S. at 438.

Even if the constitutional issues were properly before the Court, it cannot be said that the dismissal of Shelling's complaint was arbitrary or without notice. Petitioner was represented by counsel who by simply reading *Burnett v. New York Central* and *Smith v. Seaboard* should have known that he could not file a voluntary dismissal more than three years after the accident.

CONCLUSION

The Petition does not meet the criteria for review on Writ of Certiorari. The trial court and the Court of Appeals of Georgia correctly applied this Court's decision in *Burnett v. New York Central* in holding that the FELA statute of limitations had run at the time Shelling refiled his action. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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